

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

WILLIAM WOMACK,

Petitioner,

v.

DONALD HOLBROOK,

Respondent.

No. C17-5822-BHS-TLF

REPORT AND RECOMMENDATION ON  
MOTION FOR ORDER TO PRODUCE  
TRANSCRIPTS, DKT. 30  
Noted for: February 22, 2019

The District Court has referred this action filed pursuant to 28 U.S.C. § 2254 to United States Magistrate Judge Theresa L. Fricke. Petitioner William Womack filed a federal habeas petition seeking relief from a state court conviction. *See* Dkt. 1. In the petition, Womack raises numerous grounds for habeas relief, including prosecutorial misconduct that caused a due-process violation, and violation of his right to a speedy trial. Dkt. 4, 5.

The Court directed Respondent to supplement the record “with the trial transcripts and any additional state court transcripts or records related to Petitioner’s grounds for relief.” Dkt. 27. Respondent has done so. Dkt. 29.

On August 25, 2018, Womack moved for an order under Rule 5(c) of the Federal Rules Governing § 2254, directing Respondent to produce and submit transcripts of five pretrial hearings. Dkt. 30. Respondent asserts that Womack’s request is unnecessary and the transcripts he seeks are not relevant to his grounds for habeas relief. Dkt. 32.

1 The Court previously denied without prejudice a motion by Womack, Dkt. 12, for leave  
2 to conduct discovery to obtain the same transcripts:

3 Womack has not, at this stage where exhaustion of state remedies is still an issue,  
4 met his burden of proof required for either discovery or to expand the record  
5 under Federal Rules of Governing § 2254, Rule 5 or 6. Petitioner's motion for this  
6 Court to consider additional portions of the state court record, and for  
7 authorization to conduct discovery, is DENIED without prejudice. If discovery or  
8 additional portions of the state court record are necessary later in the proceedings  
under 28 U.S.C. § 2254 for federal habeas corpus review, the petitioner may raise  
this motion again, or the Court may independently order additional state court  
transcripts or documents, or may issue an order sua sponte that discovery is  
required.

9 Dkt. 16, pp. 3-4.

10 Rule 5(c) of the Federal Rules Governing § 2254 states:

11 . . . The respondent must attach to the answer parts of the transcript that the  
12 respondent considers relevant. The judge may order that the respondent furnish  
13 other parts of existing transcripts or that parts of untranscribed recordings be  
14 transcribed and furnished. If a transcript cannot be obtained, the respondent may  
submit a narrative summary of the evidence.

15 Rule 5(c), 28 U.S.C. foll. § 2254. Rule 5(c) thus gives the Court discretion in deciding whether  
16 to order Respondent to transcribe and furnish previously untranscribed recordings.<sup>1</sup>

17 Womack contends that the transcripts are relevant to two claims in his habeas corpus  
18 petition: that his fair-trial rights were violated due to prosecutorial misconduct, and that his  
19 speedy-trial right was violated. Dkt. 30, 33.

20 With respect to Womack's claim that his trial was fundamentally unfair due to  
21 prosecutorial misconduct, Womack contends that the transcripts would be relevant to decide  
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24  
25 <sup>1</sup> Respondent acknowledges that, as the Ninth Circuit has interpreted the statutory prohibitions on presenting new  
evidence in habeas proceedings, those statutes would not bar the Court from ordering the transcripts. *See* Dkt. 32, p.  
26 2 n.1 (preserving issue for appeal); *McDaniels v. Kirkland*, 813 F.3d 770, 780-81 (9th Cir. 2015) ("Federal courts  
sitting in habeas may consider the entire state-court record, not merely those materials that were presented to state  
appellate courts.").

1 whether the trial court acted unreasonably in declining “to produce the relevant parts of the  
2 record after deciding the merits of the claim,” and to decide whether the Washington Court of  
3 Appeals was unreasonable in finding that Womack waived some of his hearsay objections. Dkt.  
4 33, p. 2. On direct appeal, the Court of Appeals rejected some of Womack’s hearsay arguments  
5 because of his failure to object to those instances of alleged hearsay. Dkt. 10, Exhibit 2, p. 37.  
6 The state court also rejected several specific hearsay claims on the merits under Washington  
7 evidence law. Exhibit 2, pp. 36-38.  
8

9 With respect to Womack’s claim that his speedy-trial right was violated, he contends that  
10 the transcripts are necessary because “[a]t least on[e] of the hearings touches on” the speedy trial  
11 claim. Dkt. 12, p. 4.

12 The undersigned addresses the merits of Womack’s unfair-trial and speedy-trial claims in  
13 a separate report and recommendation. In this Order, the undersigned recommends a finding that  
14 Womack has not shown that the transcripts are necessary for the Court to resolve the issues  
15 raised in his petition.  
16

17 As Respondent points out, Womack’s argument that he was denied a fair trial due to  
18 introduction of hearsay evidence relies entirely on events that appear in the trial transcripts  
19 already in the record. *See* Dkt. 5, pp. 18-21. Although Womack contends that the missing  
20 transcripts would show that he argued at pretrial hearings that the trial court should exclude  
21 alleged hearsay evidence, this is not relevant to whether, as Womack contends, “the Prosecutor  
22 completely disregarded the court rules and the law of the land and made sure that Mr. Womack’s  
23 trial was fundamentally unfair by intentionally soliciting illegal hearsay evidence.” Dkt. 5, p. 18.  
24 To answer that question, the Court needs only the trial transcripts already before it. Thus, the fact  
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26

1 that Womack raised objections before trial would not affect the Court's determination on the  
2 merits of his fair-trial claim on habeas review.

3 Likewise, although Womack contends that the transcripts would show that he argued that  
4 he was not receiving a speedy trial, this is neither necessary nor relevant to the Court's resolution  
5 of the speedy-trial claim. As the report and recommendation explains further, Womack failed to  
6 present that claim to the Washington Supreme Court as a federal claim either on direct appeal or  
7 in collateral proceedings. *See* Exhibits 6, 16. His speedy-trial claim under the United States  
8 Constitution is thus procedurally barred at this stage. *See* 28 U.S.C. § 2254(b)(1); *Davis v. Silva*,  
9 511 F.3d 1005, 1009-10 (9th Cir. 2008).

11 Accordingly, the undersigned recommends Womack's motion for production of the  
12 pretrial-hearing transcripts, Dkt. 30, be DENIED. Womack has not identified any information  
13 likely to be contained in those transcripts that would be relevant to the Court's decision on his  
14 grounds for habeas relief.

16 The parties shall have fourteen (14) days from service of this Report and  
17 Recommendation to file written objections. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see also*  
18 Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes  
19 of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule  
20 72(b), the Clerk is directed to set the matter for consideration on **February 22, 2019**.

21 Dated this 1st day of February, 2019.

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25 Theresa L. Fricke  
26 United States Magistrate Judge